(2)

No. 06-900

Supreme Court, U.S.
FILED
MAR 2 - 2007
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

FIRST NATIONAL BANK OF AMES, IOWA,

Petitioner,

v.

INNOVATIVE CLINICAL AND CONSULTING SERVICES, LLC d/b/a/ TOCO HILLS URGENT CARE,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE GEORGIA COURT OF APPEALS

BRIEF IN OPPOSITION

TYLER DIXON
RAIFORD & DIXON, LLC
201 Allen Road
Suite 310
Atlanta, Georgia 30328
(404) 847-0860

Counsel for Respondent

207009

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

STATEMENT PURSUANT TO RULE 29.6

Respondent, Innovative Clinical and Consulting Services, LLC d/b/a Toco Hills Urgent Care, has no parent corporation and no publicly held company owns 10% or more of its stock.

TABLE OF CONTENTS

Page

STATEMENT PURSUANT TO RULE 29.6 i

TABLE OF CONTENTS ii

TABLE OF CITED AUTHORITIES iii

SUMMARY OF ARGUMENT 1

REASONS FOR DENYING THE PETITION 2

I. Factual Background 3

II. The Facts Show Requisite Minimum Contacts and Also Show Purposeful Availment. 6

III. The Claims Arise From and are Related to First National's Contacts with Georgia. 18

CONCLUSION 20

TABLE OF CITED AUTHORITIES

Page

CASES

Burger King Corp. v. Rudzewicz, 471 U.S. 462, 105 S. Ct. 2174, 85 L. Ed. 2d 528 (1985) ..... *passim*

ETS Payphone v. TK Industries, 236 Ga. App. 713, 513 S.E. 2d 257 (1999) 13

First National Bank of Ames v. Innovative Clinical & Consulting Services, 280 Ga. App. 337, 634 S.E. 2d 88 (2006) 20

First United Bank of Mississippi. v. First National Bank, 255 Ga. 505, 340 S.E. 2d 597 (1986) 16

Hanson v. Denckla, 357 U.S. 235, 78 S. Ct. 1228, 2 L. Ed. 2d 1283 (1958) 10

Helicopteros Nacionales De Colombia v. Hall, 466 U.S. 408, 104 S. Ct. 1868 (1984) 18, 19

Hollingswort v. Cunard Line Ltd., 152 Ga. App. 509, 263 S.E. 2d 190, *cert. denied* (1980) 15-16

Innovative Clinical Consulting Services v. First National Bank of Ames, 279 Ga. 672, 620 S.E. 2d 352 (2005) ..... *passim*

International Shoe Co. v. State of Washington, 326 U.S. 310, 66 S. Ct. 154, 90 L. Ed. 95 (1945) ... 6, 10

Cited Authorities

Page

McGee v. International Life Insurance, 355 U.S. 220, 78 S. Ct. 199 (1957) 17, 20, 21

McHale v. HJGM, Inc., 252 Ga. App. 641, 556 S.E. 2d 853 (2001) 13

STATUTES

O.C.G.A. § 9-10-91 3

SUMMARY OF ARGUMENT

The facts of this case so clearly show 'specific' in personam jurisdiction in Georgia that no purpose is served by granting certiorari.

The Iowa Petitioner First National established two bank accounts with the Georgia Respondent ICCS, thereby establishing the banker-depositor relationship between the parties. This was a purposeful availment of the ongoing contractual rights and obligations arising from that relationship. These accounts were established without Respondent's knowledge through Petitioner's agent who clearly transacted business in Georgia.

Pursuant to that relationship, Petitioner First National diverted approximately 100 checks belonging to Respondent and, without Respondent's knowledge or consent, deposited them into one of the secret bank accounts. All these checks were from Georgia payors payable to ICCS for services rendered in Georgia.

First National took an assignment of a Georgia Lease between Respondent ICCS and Petitioner's agent and debtor, AC Financial, so that First National then stood in the position as lessor under the Georgia Lease, which had a 3-year term and was for equipment purchased and installed in Georgia. First National, in its capacity as lessor's assignee thereby established the additional contractual relationship with ICCS of lessor-lessee under a Georgia Lease. First National's rights under that Lease were perfected by filing a UCC financing statement in Georgia pursuant to the Georgia Uniform Commercial Code.

First National then abused its banker-depositor relationship with ICCS by withdrawing monies from the ICCS account each month to pay itself the Lease payments (as lessor's assignee under the Georgia Lease).

When ICCS discovered the secret accounts and diverted checks, it repeatedly demanded that First National close the account, remit the account balance and forward to ICCS any future checks First National received. Though First National promised to do so, it withdrew yet another lease payment before remitting. Then, as it received more Georgia checks payable to ICCS, it re-opened the account, deposited the checks, and then withdrew more monies to pay toward the disputed Georgia Lease.

Respondent ICCS sued, asserting, among other things, claims for breach of contract, fraud and conversion. All those claims arise from *and* are directly related to the business and contractual relationships established between First National and ICCS — all involving contacts with Georgia.

REASONS FOR DENYING THE PETITION

Petitioner misstates the facts. As will be seen below, Petitioner's statement at page 5 of its Petition that "it is undisputed that the only contact First National had with the State of Georgia in connection with this matter was that the bank statements and correspondence concerning the account were mailed to ICCS and that First National responded to an occasional phone call from ICCS regarding the account" *is categorically false.* The pertinent facts are set forth below in Part I.

"O.C.G.A.§ 9-10-91(1) grants Georgia courts unlimited authority to exercise personal jurisdiction over any nonresident who transacts any business in this State," and is construed to reach "to the maximum extent permitted by procedural due process." *Innovative Clinical Consulting Services v. First National Bank of Ames*, 279 Ga. 672, 675, 620 S.E. 2d 352, 355 (2005). The statute does not require the nonresident's physical presence in the state, is not limited to contract cases, and the Georgia Supreme Court expressly noted that it does not "minimize the import of a nonresident's *intangible contacts* with the State." *Id.*, emphasis supplied.

Therefore, since the applicable statute is coterminous with constitutional due process, no statutory construction is necessary, and this Court need only address the due process analysis.

I. *Factual Background*

Suit was filed in Georgia by Innovative Clinical and Consulting Services, Inc. ("ICCS"), a Georgia company with all its offices and operations in Georgia, against First National Bank of Ames, Iowa ("First National"), a nonresident bank. ICCS is an emergency medical clinic that contracted with Med e Fund, a Georgia company, and AC Financial, an Iowa company, for a billing system and related services. The overall agreement included, among other things, an equipment lease (the "Lease") for computer equipment and software purchased in Georgia by AC Financial from a Georgia seller and leased to ICCS. R-005-006, 018-024. The Lease, which was negotiated and signed in Georgia, had a 3-year term. AC Financial's purchase of the equipment was financed by First National. The Lease was for equipment purchased, installed and operated in Georgia, and ICCS had

an option to purchase the equipment. R-092-093, 0130-0132. AC Financial assigned the Georgia Lease to First National without ICCS's knowledge, thereby creating privity of contract between First National and ICCS, as lessor-lessee under the Georgia Lease. R-0146-0149. First National's rights under the Georgia Lease were perfected by the filing of a UCC financing statement recorded in Georgia pursuant to the Georgia Uniform Commercial Code. R-0117, 0143-0144. In addition, two bank accounts were established at First National in ICCS's name without the knowledge or consent of ICCS.[1] AC Financial, whose representative met with ICCS in Georgia, acted as First National's agent in doing so. R-086, 324, 326. Apparently only one of these accounts had activity in it (though First National did not produce all statements). R-0153-0204. Checks payable to ICCS for healthcare services rendered in Georgia for Georgia residents were deposited into one of these secret bank accounts with First National. Virtually all these checks were issued by Georgia payors and drawn on banks located in Georgia. (R-86, 324, 326). Periodically, without notice to or consent of ICCS, First National withdrew money from the ICCS account to pay Lease payments to First National as AC Financial's assignee. These withdrawals corresponded with lease payments under the disputed Lease, and were, in essence, First National's use of ICCS's funds to pay the debt owed to First National by AC Financial. When ICCS discovered the existence of the secret bank account, it immediately demanded that the account be closed, that the balance be remitted to ICCS, and that any future checks payable to ICCS received by First National be forwarded to

[1] A lockbox account was to be established, but the agreements were rescinded before that occurred. Neither of the accounts in question was a lockbox account, and ICCS had no knowledge either had been opened. R-006-007, 016-024, 095-096.

ICCS. First National agreed, but withdrew more monies from the account before remitting the reduced balance to ICCS. R-0025, 0088-0090. When subsequent checks payable to ICCS were received by First National, instead of delivering them to ICCS as promised, First National re-opened the ICCS account without authorization, deposited the checks into the re-opened account, and then withdrew monies to pay itself on the debt owed by AC Financial, again under the guise of withdrawing Lease payments. This happened repeatedly despite repeated telephonic and written demands to close and keep the account closed, and to remit all funds to ICCS. In this manner First National breached its banker-depositor contractual relationship with ICCS and converted approximately 100 checks belonging to ICCS. First National continues to hold monies belonging to ICCS. R-0008-0009, 0026, 0156, 0169, 0188, 0192, and 0200.

These transactions included not only the electronic banking transactions with Georgia, but also letters' invoices and bank statements mailed to and from Georgia, and telephone calls to and from Georgia.

In addition to the Georgia Lease to a Georgia Lessee of equipment in Georgia (perfected by recording a UCC financing statement in Georgia), ICCS sued Med e Fund and AC Financial first[2] (at that time ICCS thought First National was cooperating to get the funds returned to ICCS), and later when ICCS discovered the facts described above, it sued First National for fraud, conversion, breach of contract, an

[2] It is important to note that the first case resulted in a final judgment against Med e Fund and AC Financial (First National's agent and debtor) for damages and other relief, including the rescission of Lease as being void *ab initio* in that it was procured by fraud.

accounting and rescission and also alleged that First National conspired with Med e Fund and AC Financial to defraud, convert, etc. (R-0005-0012, 0320-0322).

II. *The Facts Show Requisite Minimum Contacts and Also Show Purposeful Availment.*

"Due Process requires only that in order to subject a defendant to a judgment in personam, if he be not present within the territory of the forum, he has certain minimum contacts with it such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice." *International Shoe Company v. State of Washington*, 326 U.S. 310, 316, 66 S. Ct. 154, 158, 90 L. Ed. 95 (1945). "The Due Process Clause protects an individual's liberty interest in not being subject to the binding judgments of a forum with which he has established no meaningful contacts, ties or relations. By requiring that individuals have fair warning that a particular activity may subject them to the jurisdiction of a foreign sovereign, the Due Process Clause gives a degree of predictability to the legal system that allows potential defendants to structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit." (citations and punctuation omitted) *Burger King Corporation v. Rudzewicz*, 471 U.S. 462, 471-472, 105 S. Ct. 2174, 2181-2182, 85 L. Ed. 2d 528 (1985).

Where a forum seeks to assert specific jurisdiction over an out-of-state defendant who has not consented to suit there, this 'fair warning' requirement is satisfied if the defendant has "purposefully directed" his activities at residents of the forum, and the litigation results from alleged injuries that 'arise out of or relate to' those activities. *Id.*, 472, 2182.

"And with respect to interstate contractual obligations, we have emphasized that parties who reach out beyond one state *and create continuing relationships and obligations* with citizens of another state are subject to regulation and sanctions in the other State for the consequences of their activities." *Id.* (emphasis supplied). By establishing two bank accounts in a Georgia resident's name, even though done without the resident's knowledge or consent, First National "reached out" to Georgia created a continuing relationship and continuing obligations with ICCS, a Georgia resident, by establishing the banker-depositor relationship. It established that relationship through its agent, AC Financial, which clearly transacted business in Georgia (with ICCS and other Georgia residents).

First National also reached out to Georgia to "service" the Georgia Lease, purportedly on behalf of AC Financial, to demand that ICCS make Lease payments to First National, not AC Financial. First National did this without disclosing that it had taken an assignment of the Lease from AC Financial and had been withdrawing monies from ICCS's account to make Lease payments.

By taking an assignment of the Georgia Lease, First National purposefully attempted to create yet another contractual relationship between itself and ICCS, along with the continuing relationship and obligations attendant to such lessor-lessee relationship. It cannot be argued that the Lease was not a Georgia lease, in that (a) it was executed pursuant to an overall agreement between Georgia parties, (b) it was negotiated and signed in Georgia, (c) the lessee was a Georgia resident, (d) the equipment leased was purchased in Georgia for the purpose of being installed and used in Georgia, (e) the equipment was in fact installed in Georgia,

and (f) the lessor's rights under the Lease were perfected by the filing of a UCC financing statement in Georgia pursuant to the Georgia Uniform Commercial Code. The fact that the Lease has since been declared void *ab initio* does not alter the fact that First National "purposely availed itself" of the benefits to be derived from doing business with a Georgia resident and sought to perfect enforcement rights and remedies under the Georgia Uniform Commercial Code.

First National seeks to circumvent this fact by arguing that the forum selection clause in the Lease precludes its consideration as a "contact" with Georgia. This argument fails for three reasons:

(1) The Lease has been adjudicated void *ab initio* for having been procured by fraud. Hence, the forum selection clause, along with the entire Lease itself, is void *ab initio* and cannot stand as a basis for forum selection. — citation —

(2) Perfecting lessor's rights under the Georgia Lease by recording a UCC financing statement in Georgia is clearly an act calculated by First National to purposefully avail itself of the rights and remedies provided by the Georgia Uniform Commercial Code (and since those remedies include extra-judicial remedies, those rights are not in any way affected by a forum selection clause, even had the Lease not been voided).

(3) The activity in seeking and creating the lessor-lessee relationship with ICCS in order to collect from ICCS monies owed First National by AC Financial is directly related to First National's misuse and breach of its banker-depositor relationship (and its attendant continuing obligations) with

ICCS. Hence, this fact shows that the claims of ICCS "arise out of or are related to" First National's contacts with Georgia.

> We have noted several reasons why a forum legitimately may exercise personal jurisdiction over a non-resident who purposefully directs his activities towards forum residents. A State generally has a manifest "interest" in providing its residents with a convenient forum for redressing injuries inflicted by out-of-state actors. Moreover, where individuals *purposefully derive benefit from their interstate activities*, it may well be unfair to allow them to escape having to account in other States for consequences that arise proximately from such activities; the Due Process Clause may not readily be wielded as a territorial shield to avoid interstate obligations that have been voluntarily assumed. And because modern transportation and communications have made it much less burdensome for a party sued to defend himself in a State where he engages in economic activity, it usually will not be unfair to subject him to the burdens of litigating in another forum for disputes relating to such activity.

Id. 473-474, 2182-2183. (emphasis supplied). This is even more true today than when *Burger King* was decided, given the ease and speed with which documents and other data may be stored and transmitted.

First National purposefully derived benefit from its interstate activities with Georgia. First National derived the benefit of the monies it converted through the illicit

withdrawals from ICCS's account, the benefit of lease payments from the Georgia Lease, the anticipated continuation of those payments for 3 years, the security of collateral (equipment) in Georgia, and the power to utilize the recorded UCC-1 financing statement to exercise rights under Georgia's Uniform Commercial Code.

"Notwithstanding these considerations, the constitutional touchstone remains whether the defendant purposefully established minimum contacts in the forum State." *Id.*, 474, 2183, citing *International Shoe Company, supra.* "The foreseeability that is critical to due process analysis . . . is that the defendant's conduct and connection with the forum State are such that he should reasonably anticipate being haled into court there." *Id.* Procuring for oneself the right to seek remedies in Georgia under Georgia's Uniform Commercial Code is an act that necessarily anticipates "being haled into court" in Georgia.

> In defining when it is that a potential defendant should reasonably anticipate out-of-state litigation, the Court frequently has drawn from the reasoning of *Hanson v. Denckla*, 357 U.S. 235, 253, 78 S. Ct. 1228, 1239-1240, 2 L. Ed. 2d 1283 (1958): "The unilateral activity of those who claim some relationship with a non-resident defendant cannot satisfy the requirement of contact with the forum State. The application of that rule will vary with the quality and nature of the defendant's activity, but it is essential in each case that there be some act by which the defendant purposefully avails itself of the privilege of conducting

> activities within the forum State, thus invoking the benefits and protections of its laws."

Burger King, supra, at 474-475, 2183.

This relationship was not the result of ICCS's unilateral act. To the contrary, it was the result of First National's act. ICCS did not even know of First National's existence when First National purposefully availed itself of the opportunity to take control of ICCS funds through establishing an ICCS account without ICCS's consent, depositing checks belonging to ICCS into that secret account, withdrawing ICCS funds from said account, to make payments under the disputed Georgia Lease, and applying same to a debt owed to First National by AC Financial. First National further purposefully availed itself of the contractual rights of lessor under the Georgia Lease (including those rights perfected by the filing in Georgia of the UCC-1 financing statement pursuant to the Georgia Uniform Commercial Code). This gave First National the right to demand and seize equipment located in Georgia. It also gave First National the right to receive whatever Lease payments became due under the Georgia Lease. Furthermore, had ICCS exercised the purchase option under the Lease, First National would have had the right to receive payment of the purchase price for the equipment in Georgia, and would have been obligated to convey title to said equipment.

"This 'purposeful availment' requirement ensures that a defendant will not be haled into a jurisdiction solely as a result of 'random,' 'fortuitous ,' or 'attenuated' contacts, or of the 'unilateral activity of another party or a third person.'" (citations omitted) *Id.* 475, 2183. "Jurisdiction is proper, however, where the contacts proximately result from actions

by the defendant himself that create a *substantial connection with the forum State.*" (emphasis applied) *Id.*, 475, 2183-2184.

> Thus, where the defendant deliberately has engaged in significant activities within a State, or has created continuing obligations between himself and the residents of the forum, he manifestly has availed himself of the privilege of conducting business there, and because his activities are shielded by the benefits and protections of the forum's laws it is presumptively not unreasonable to require him to submit to the burdens of litigation in that forum as well.

Id., 475-476, 2184.

First National purposefully availed itself of taking the assignment of AC Financial's lease with ICCS for equipment in Georgia, purposefully availed itself of opening an account in the name of ICCS so it could deposit the checks received from Georgia and payable to ICCS, and purposefully converted those Georgia deposits to its own benefit. In taking the lease assignment and establishing the bank accounts, First National purposefully created ongoing relationships and obligations between it and ICCS, not only as banker-depositor, but also as lessor-lessee. Since the lease gave ICCS a purchase option, First National purposefully availed itself of the obligation to sell the equipment to ICCS (thereby deriving even more revenues) should ICCS exercise the option. In recording the UCC financing statement, First National purposefully availed itself of the "benefits and protections" of Georgia's Uniform Commercial Code. Under these facts, "it is presumptively not unreasonable to require

[First National] to submit to the burdens of litigation in [Georgia] as well." *Id.*

It should be noted that the non-resident defendant has the burden of proof to show that it is not subject to long arm jurisdiction. *McHale v. HJGM*, Inc., 252 Ga. App. 641, 642, 556 S.E. 2d 853, 855 (2001). The facts of the case are to be reviewed "in the light most favorable to the exercise of personal jurisdiction." *ETS Payphone v. TK Industries*, 236 Ga. App. 713, 513 S.E. 2d 257 (1999).

In summary, the contacts with Georgia include:

a. First National opened 2 bank accounts in the name of ICCS without the knowledge, consent or authorization of ICCS. This created a contractual relationship with ICCS (albeit an implied contract at first since ICCS did not know of its existence). It also created the relationship of banker-depositor with all the right and obligations attendant thereto.

b. First National received and deposited more than 100 checks payable and belonging to ICCS into one of these unauthorized accounts without any authorization or consent from ICCS;

c. First National then systematically withdrew monies from said unauthorized account over a period of months to make lease payments under a disputed Georgia Lease in order to pay a debt owed to First National by AC Financial (the First National customer which had assigned the Georgia Lease to said bank), with none of these withdrawals having been authorized or consented to by ICCS (First National continues to withhold money belonging to ICCS as evidenced by the last bank statement produced by First National in

discovery). Each of these withdrawals constituted a separate tortious conversion, as well as a breach of the implied contract between banker-depositor.

d. Once ICCS discovered the existence of said account and the fact that said account was being used to pay monies on the Lease assigned to First National, ICCS demanded that the account be closed and that all monies deposited therein be disbursed to ICCS; but despite its promise to do so (the implied banker-depositor contract had now become and express contract), and the repeated demands of ICCS, First National continued to wrongfully deposit ICCS's checks into said unauthorized account, and also continued making unauthorized withdrawals from ICCS's account for the benefit of First National.

e. First National took an assignment of the Georgia Lease between ICCS (as Lessee) and AC Financial (as Lessor), the interest of Lessor being perfected by recording a UCC financing statement in Georgia. This created another contract between First National and ICCS, that of lessor-lessee.[3] That Lease was for equipment in Georgia, and gave First National the right to collect lease payments from ICCS for a period of 3-years; and, in the event of default, the right to repossess the equipment installed in ICCS's office in Georgia. First National's rights with respect to the Georgia Lease were protected by recording a UCC financing statement in Georgia. Since the Lease gave ICCS an option to purchase the equipment, by taking the assignment of the Lease from

[3] First National has since filed suit, in its own name, against ICCS, alleging default under the Lease and seeking to recover damages for non-payment of rent. Therefore, any claim that it has no privity of contract with ICCS is disingenuous at best.

AC Financial, First National also took the obligation to sell the equipment in Georgia to ICCS in the event ICCS exercised its option to purchase, and the right to receive the sales proceeds.

The scheme started with the inducement to get ICCS's Georgia customers to send their payments to First National. The opening of the unauthorized account, each unauthorized deposit of ICCS's checks into said account, and each unauthorized withdrawal from ICCS's account constitutes a tortious misappropriation or conversion of monies belonging to ICCS *and* a breach of the banker-depositor contract. This systematic scheme of creating an unauthorized account, then utilizing same to funnel ICCS's money into said account to pay another bank customer's (AC Financial) debt to First National (which debt was secured by the disputed Georgia Lease between ICCS and AC Financial) constitutes a deliberate course of conduct to do business with and derive benefits from a Georgia resident. Each deposit of these checks, most of which were made by Georgia payors and drawn on Georgia banks, was a transaction occurring both in Georgia and in Iowa, with the clear intent that the impact would be in Georgia. Each deposit and withdrawal was a tortious conversion of the Georgia resident's property and a breach of the banker-depositor contract causing damage in Georgia.

First National argues that it does not regularly transact business in Georgia, but even if that were true, that alone is not dispositive of jurisdiction, particularly where "specific" in personam jurisdiction is shown. The contacts listed here reveal the "purposeful availment" described in *Burger King*, supra, and these activities and the status of the parties must be viewed "in a realistic commercial light." *Hollingswort v.*

Cunard Line Ltd., 152 Ga. App. 509, 513, 263 S.E. 2d 190, *cert. denied* (1980). The facts here are distinguishable from those in *First United Bank v. First National Bank*, 255 Ga. 505 (1986). There the bank's only involvement or contact was to process a single check through normal banking channels, and the Court held that was not sufficient contact. Unlike the case *sub judice*, in *First United* there was no ongoing relationship between the resident and non-resident, no depository account, no lease, no option to purchase, no collateral, no persistent course of conduct, no breach of contract and no tortious conduct. Here First National has engaged in a "persistent course of conduct" specifically directed at ICCS in Georgia, and has "derived substantial benefit from goods used" in this State.

The scheme included the fraudulent inducement to get ICCS's Georgia customers to send their checks to First National's agent in Iowa for deposit into the secret account with First National. First National persistently accepted checks (over 100) from Georgia payors, persistently deposited them in the unauthorized account, and persistently withdrew those monies for its own benefit, all without authorization — and all with the intent that First National would receive the payment (revenues) made in Georgia by Georgia payors for healthcare services rendered in Georgia by Georgia healthcare providers for Georgia residents. This is a persistent course of conduct for which First National derived substantial revenues — and contemplated receiving those revenues for at least 3 years.

Similarly, by taking the assignment of the Georgia Lease and all proceeds thereof, First National engaged in a persistent course of conduct. It perfected its interest through recording a UCC financing statement, thereby availing itself

of the protection, rights and remedies (as well as obligations) under the Georgia Uniform Commercial Code. It therefore had repossessory rights of the equipment in ICCS's Georgia office. It derived revenues (lease payments) for "goods used" (the equipment), and contemplated that that would continue throughout the 3-year term of the lease. It persistently invoiced ICCS, and persistently made unauthorized withdrawals from the ICCS account to make lease payments.

There is a contractual relationship between a bank and its depositor. Here, since the account was opened surreptitiously by First National and AC Financial without ICCS's knowledge, it began as an implied contract. That contract emphasized contacts with Georgia. All the checks deposited were payable to ICCS, a Georgia resident. The account was in the name of ICCS, a Georgia resident. All its deposits came from Georgia, generated by services rendered in Georgia for Georgia residents. The depository contract was purposefully and persistently used by First National to extract payments on a Georgia Lease to which First National was a party.

First National was a party, by assignment, to the Georgia Lease for equipment bought, installed, leased and used in Georgia. First National's rights under this contract were further protected by the purposeful recording in Georgia of a UCC financing statement.

In *McGee v. International Life Insurance*, 355 U.S. 220, 78 S. Ct. 199 (1957) this Court held that a non-resident insurer could be sued in California even though its sole contact was one insurance policy issued to a California insured who mailed premiums from California. The Court held that "It cannot be denied that California has a manifest

interest in providing effective means of redress for its residents when their insurers refuse to pay claims." *Id.* 223. Georgia has no less a "manifest interest" in providing its residents an effective means of redress when their banks breached the depository agreement by converting and withholding monies deposited into the resident's account, and further breach the depository agreement by refusing to allow the Georgia depositor to withdraw its own funds.

While the decisions regarding long-arm jurisdiction are often replete with two and three prong tests, it all comes down to "minimum contacts." In *Burger King*, supra at 474, after discussing various considerations useful in the analysis of due process requirements, the Court observed that "Notwithstanding these considerations, the constitutional touchstone remains whether the defendant purposefully established 'minimum contacts' in the forum State." First National did so here.

III. *The Claims Arise From and are Related to First National's Contacts with Georgia.*

It is clear from the foregoing that ICCS's cause of action is one "arising out of or related to" First National's activities with or in Georgia. *Helicopteros Nacionales De Colombia v. Hall*, 466 U.S. 408, 104 S. Ct. 1868 (1984). In *Helicopteros* the activities within the State were not directly related to the plaintiffs' claims. Indeed, none of the parties were residents of the forum state. That is not the case here.

All of First National's contacts with Georgia were directly aimed at ICCS and are directly related to ICCS's claims, all of which arise from First National's contacts with Georgia.

First National took the lease assignment so as to collect lease payments from ICCS, and it in fact did collect lease payments by withdrawing them from ICCS's account at First National.

First National perfected its rights under the Lease by recording a UCC financing statement so that it would have enforcement remedies (including extra judicial remedies) against ICCS as afforded by the Georgia Uniform Commercial Code.

First National established bank accounts in the name of ICCS to enable First National to collect and deposit checks from Georgia that were payable to ICCS, thereby gaining control over ICCS funds.

First National withdrew ICCS funds from the ICCS account in order to make the Lease payments as described above, because another of First National's customers (AC Financial) had defaulted.

All these contacts, both tangible and intangible, were the purposeful acts of First National and were specifically directed at a Georgia resident, ICCS. These contacts are the very same facts giving rise to the claims asserted by ICCS, and this is true regardless of whether there is any readily definable dichotomy between "arising out of" and "related to."

Under the facts of this case, it is so palpably clear that the cause of action both "arise out of" and "is related to" First National's contacts with Georgia, that this case does not present an appropriate fact situation to provide the clarification Petitioner claims is needed after *Helicopteros*.

As noted by the Georgia Court of Appeals, "The bank sought out ICCS when its Iowa customer defaulted, and Georgia has an interest, as does every state, in providing it own citizens with a convenient forum for redressing injuries wrought by nonresidents who have sought the state's citizens out for the purpose of business gain." *First National Bank of Ames v. Innovative Clinical & Consulting Services*, 280 Ga. App. 337, 338, 634 S.E. 2d 88, 89-90 (2006).

CONCLUSION

It therefore appears that the facts support the lower courts' findings that sufficient "minimum contacts" exist, that First National has "purposefully availed itself" of Georgia commerce and Georgia law (its Uniform Commercial Code) to transact business and seek economic gain, and has purposefully sought out and directed those activities toward ICCS. The cause of action asserted by ICCS is directly related to First National's contacts with Georgia, and directly arises out of those very same contacts. Accordingly, this case is not appropriate for the grant of certiorari, and certiorari should be denied.

Respondent also notes that there is a particularly important interest for the several states to provide a convenient forum for its citizens where a nonresident bank seeks out a resident for purposes of establishing bank accounts and a banking relationship. That alone is sufficient to confer personal jurisdiction. The vested interest each state has in protecting its citizens from unscrupulous banking practices is no less important than the same interest in protecting its citizens from insurance companies which refuse to pay claims — as was the case in *McGee v. International Life Insurance Company*, 355 U.S. 220, 78 S. Ct. 199 (1957).

The contacts between ICCS and First National with respect to the banking relationship were far greater than those between *McGee* and the insurance company. Add to that the additional contractual and business relationship of lessor-lessee, and there can be no doubt that "specific" in personam jurisdiction was properly conferred upon the Georgia courts under the facts of this case.

Accordingly, ICCS asks that First National's petition for a writ of certiorari be denied.

Respectfully submitted,

TYLER DIXON
RAIFORD & DIXON, LLC
201 Allen Road
Suite 310
Atlanta, Georgia 30328
(404) 847-0860

Counsel for Respondent